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AUTHORITIES CITED.

Cases:

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

ALEXANDER KAHN ET AL., APPELLANTS,
v.
AUGUST V. ANDERSON, WARDEN OF THE United States Penitentiary at Leavenworth, Kansas. } No. 421.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF ON BEHALF OF THE APPELLEE.

STATEMENT OF CASE.

As the case was decided below on a motion to dismiss the petition (R. 13, 14), its allegations are all that need be considered. It alleged (R. 3) that on July 29, 1918, the petitioners were each of them, respectively, serving at the disciplinary barracks at Fort Leavenworth sentences previously imposed by general courts-martial for military offenses committed during the year 1918; *but it did not allege that at the time of filing the petition the said prior sentences had expired. Nor did the petition allege that said prior sentences included, as part of the punishment,*

discharge from the Army of the United States. It then alleged that on October 19, 1918, the President, by special order published October 22, 1918 (and set out in the petition, R. 4), appointed a general court-martial to sit at Fort Leavenworth for the trial of such persons as should be brought before it. This court consisted of eight officers (R. 4), *but the order recited that a greater number could not be assembled without manifest injury to the service.* Of these officers, two were retired and three were members of the "United States Guards." On November 4, 1918, the petitioners were charged before this court with the murder of a fellow prisoner on July 29, 1918. On November 25th they were found guilty and sentenced, and the sentences were approved by the reviewing authority with immaterial variations. It is these sentences which the petitioners claimed were entirely void for the following reasons:

1. The court-martial consisted of less than 13 members in violation of the 5th article of war (R. 10).

2. The court-martial was not lawfully constituted in that—

(*a*) Retired officers sat on it without warrant of law (R. 10);

(*b*) Officers of the "United States Guards" sat on it and the record of the court does not show that these persons were officers in the United States Army (R. 10, 11).

3. The charge alleged that the murdered man was killed by striking, kicking, stamping, and by cutting

him with a knife, whereas the evidence showed that his death was caused by a fall (R. 11, 12).

4. The petitioners had been, prior to the commission of the murder of which they were convicted, discharged from the Army, as the result of their prior sentences, and therefore were not subject to military jurisdiction (R. 12).

5. There was peace in the State of Kansas and throughout the United States on the date of the murder, viz, July 29, 1918, for the reason that the civil courts throughout that territory were open, and hence the court-martial had no jurisdiction of a charge of murder (R. 11).

ARGUMENT.

POINT 1. The court-martial consisted of less than thirteen members in violation of article 5 of the Articles of War (act of August 29, 1916, c. 418, sec. 3, 39 Stat. 651).

This point was made as early as 1827 in *Martin* v. *Mott*, 12 Wheat. 19, 34, 35), and denied by Mr. Justice Story, delivering the opinion of the court, in the following language:

> Supposing these clauses applicable to the court-martial in question, it is very clear that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. But the present avowry goes further, and alleges not only that the court-martial was appointed by a general

> officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the 64th article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

Attention is called to the fact that the language of the avowry in *Martin* v. *Mott* (see 12 Wheat. 21) was precisely similar to special order No. 247 detailing the court-martial in the case at bar (R. 4). The rule thus laid down in *Martin* v. *Mott* was, on principle, affirmed in *Mullan* v. *United States* (140 U. S. 240, 245), and in *Swaim* v. *United States* (165 U. S. 553, 559, 560), and must be considered as settled.

POINT 2. The court-martial was not lawfully constituted in that—

(*a*) Retired officers sat on it without warrant of law.

Article 4 of the Articles of War (act of August 29, 1916, c. 418, 39 Stat. 651) provided that—

> All officers in the military service of the United States * * * shall be competent to serve on courts-martial.

In *United States* v. *Tyler* (105 U. S. 244) this court, after construing the statutes relating to retirement from active service in the Army, and section 1094, R. S. (at the time of the court-martial in the case at bar, act of June 3, 1916, c. 134, sec. 2,

39 Stat. 166), designating the composition of the Army of the United States, concluded (105 U. S. 246):

> We are of opinion that retired officers are in the military service of the Government.

Such being the status of retired officers, who, were it not for the prohibition of section 1259, R. S., would be entitled, under the decision in *United States* v. *Tyler*, to sit on courts-martial without any specific authority, the act of April 23, 1904, c. 1485, 33 Stat. 264, Comp. Stats. 2078, provided in part that—

> The Secretary of War may assign retired officers of the Army, with their consent, to active duty * * * upon courts-martial * * *.

The record in the case at bar shows (R. 4) that the retired officers whose compentency is objected to were assigned by the Secretary of War in Special Orders, No. 247 (R. 4) to sit on the court-martial which tried plaintiffs in error. Their judicial status, therefore, was determined by the act of April 23, 1904, c. 1485, *supra*, and they were clearly competent.

(*b*) "United States Guards" sat on the court-martial, whereas the record of the court does not show that they were officers in the military service of the United States as required by the 4th article of war, *supra*.

Section 2 of the selective draft act of May 18, 1917, c. 15, 40 Stat. 77, Comp. Stats. 2044 b, provided as follows:

> *Provided*, That the President is authorized to raise and maintain by voluntary enlistment

> or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

Pursuant to the authority so conferred, the President raised and organized the United States Guards under Special Regulations No. 101, the material portions of which are printed as an appendix to this brief. The above statute and regulations make it clear beyond question that officers of the United States Guards were "officers in the military service of the United States" within the meaning of the 4th article of war, *supra*. The words last quoted include officers in every branch of the service, e. g., Coast Artillery and Engineers, as well as Infantry and Cavalry, and necessarily, therefore, include United States Guards, who, if they were not "in the military service of the United States" were not in any service at all.

POINT 3. The allegations of the charge as to the manner in which the death of the fellow prisoner, for whose murder the appellants were convicted, was caused were not proved.

An objection, not going to the jurisdiction of the court-martial, but to the manner of its exercise of an undoubted jurisdiction, can not be made on habeas corpus. (*Smith* v. *Whitney*, 116 U. S. 167, 176, 177, and authorities cited.)

POINT 4. The appellants had been, prior to the commission of the offense, discharged from the Army, as the result of their prior sentences, and therefore were not subject to the jurisdiction of a court-martial.

(a) The petition does not allege that the prior sentences of each of the appellants, respectively, included, as part of the punishment imposed thereby, discharge from the Army of the United States. It merely alleges that the appellants were each serving sentences for terms of more than one year imposed by general courts-martial. It alleges also (it is true) that they were not members of or serving as soldiers in the Army (R. 3), and (R. 12) that by said sentences the appellants were discharged from the Army long prior to July 29, 1918. But these allegations are merely conclusions of law. If, in fact, the several sentences previously imposed on appellants contained, as part of the punishment, discharge from the Army, it would have been easy to allege the fact specifically, and it was the duty of appellants so to allege it, if the alleged discharge was to be made the basis for a collateral attack, by petition for habeas corpus, upon the jurisdiction of the court-martial. According to our information, even when discharge from the Army is made part of the sentence of a court-martial, that part of the sentence is suspended until complete

execution of the part imposing imprisonment. Such may have been the case as to appellants, if their sentences included discharge at all. At any rate the petition failed to sufficiently allege the fundamental fact upon which this point of objection is based.

(b) Even if the petition can be construed as sufficiently alleging that the previous sentence of each of the appellants included, as part of the punishment thereby imposed, discharge from the Army, and that said portion of the sentence was not suspended, the result is the same. The act of March 3, 1873, c. 249, 17 Stat. 582 (R. S. secs. 1344–1361), created a military prison for the confinement and government of all offenders convicted before any court-martial in the United States. Its officers and guards were soldiers. The Secretary of War was authorized to remit the sentences of deserving prisoners, and to give them an honorable restitution to duty if the case merited. Similar provisions existed at the time of the offense and trial of plaintiffs in error. (See act of Mar. 4, 1915, c. 143, sec. 2, 38 Stat. 1084, Comp. Stats. 2458a, Title 14, ch. 6.) In connection with the creation of this military prison, section 1361, R. S., provided:

> All prisoners under confinement in said military prisons undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial under the rules and articles of war for offenses committed during the said confinement

In *Ex parte Wildman* (1876), Fed. Cas. 17653a, Judge Foster, District Judge for the District of Kansas, decided that a prisoner in the military prison whose sentence included discharge from the Army was subject to trial by court-martial under R. S. 1361, *supra*, and that the statute was constitutional. This decision was approved by Attorney General Devens (who had military as well as legal experience) in 16 Ops. A. G. 292, saying:

> Though no longer a soldier, he is a military prisoner, and for the purposes of discipline and punishment is still connected with the military service. It is a case, to use the language of the Constitution, "arising in the land forces of the United States." It grows out of the prisoner's relation to the Army. Under the power to make rules for "the government and regulation of the land and naval forces," Congress has provided that cases of this class shall be tried by court-martial.

The same view was taken by a most able circuit judge, Thayer, in *In re Craig* (70 Fed. 969), where he said:

> Much stress, however, is laid on the fact that when the offense for which Craig was tried and convicted was committed he had been discharged from the Army and was no longer subject to military law or discipline. This contention overlooks the fact that the discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture

> of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a military prison. A discharge executed under these circumstances and for such a purpose can not be said to have had the effect of severing his connection with the Army and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held. The views thus expressed are supported by an opinion of Judge Foster, United States district judge for the district of Kansas, in the case of *Ex parte Wildman* (Fed. Cas. No. 17653a), which was decided in the year 1876; also by an opinion of Attorney General Devens (16 Ops. Attys. Gen. 292) and by an elaborate decision of Judge Sawyer in *Re Bogart* (2 Sawy. 396, Fed. Cas. No. 1596).

Finally, in *Carter* v. *McClaughry* (183 U. S. 365, 383), this court said:

> The accused was proceeded against as an officer of the Army and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case but the power to execute and enforce the sentence of the law. Having been sentenced,

> his status was that of a military prisoner held by the authority of the United States as an offender against its laws.
>
> He was a military prisoner though he had ceased to be a soldier, and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. (Rev. Stat., sec. 1361.)

The court also pointed out that in *Coleman* v. *Tennessee* (97 U. S. 509) it had been held that a sentence of a court-martial might be carried out after the person convicted had severed all connection with the Army and that Attorney General Devens had subsequently advised as to Coleman that he might be executed in pursuance of the sentence of death.

The jurisdiction conferred by section 1361, R. S., and construed in the above authorities was subsisting when the appellants in error were tried, paragraph (e) of the 2d article of war (act of August 29, 1916, c. 418, sec. 3, 39 Stat. 651, Comp. Stats. 2308a) providing that "all persons under sentence adjudged by courts-martial" were subject to the Articles of War.

The claim that such a provision is unconstitutional overlooks the broad powers conferred by the Constitution on Congress to raise and support armies and to make rules for the government and regulation of the land and naval forces, as well as the broad exemption of the 5th amendment, viz, "cases arising in the land or naval forces." The jurisdiction so conferred and excepted is not confined to persons who are strictly in the Army proper nor to their

strictly military duties. (As to the latter, see *Smith* v. *Whitney* 116 U. S. 167, 183–186). For a long time the jurisdiction has been extended to retainers to the camp and to persons serving with the armies in the field, and this jurisdiction has been sustained by the courts. (See, e. g., *Ex parte Gerlach*, 247 Fed. 616; *Ex parte Falls*, 251 Fed. 415; *Hines* v. *Mikell*, 259 Fed. 28, C. C. A. 4th, cert. den. 250 U. S. 645.) *A fortiori* a person who has changed his status as a soldier only to become a military prisoner can, under the powers over the land and naval forces conferred on Congress by the Constitution, be still left subject to court-martial jurisdiction.

POINT 5. It was a time of peace throughout the United States and the State of Kansas, the courts being open and engaged in the free, uninterrupted, and prompt administration of justice, at the time the offense of murder was committed, and therefore the court-martial had no jurisdiction.

The charge upon which appellants were convicted was violation of the 92d article of war (act of August 29, 1916, c. 418, 39 Stat. 664, Comp. Stats. 2308a), which reads as follows:

> Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may (be) direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

As indicated above, it is claimed that the limiting words in this article, "in time of peace," mean "in a time when the ordinary civil courts are fully and freely open at the place where the court-martial is held or (at any rate) at the place where the offense is committed."

(*a*) It, of course, can not be denied that at the time the offense was committed, viz, July 29, 1918, and at the time when the court-martial convened, viz, November 4, 1918 (R. 6), the United States was at war. Some point is made that sentence was not pronounced until after the armistice was signed. But apart from the fact that article 92, *supra*, differing perhaps in this respect from section 1342, R. S., article 58, related the "time of peace" to the commission of the offense, not to the trial, it is settled that if jurisdiction once validly attaches as, e. g., by formal charges and convention of the court, subsequent events can not divest it. (*Carter* v. *McClaughry*, 183 U. S. 365, 383.) Therefore the case at bar is not complicated by any question as to the effect of the armistice.

The words "in time of peace," in connection with the trial of soldiers for offenses over which the civil courts would ordinarily have jurisdiction, first appeared in article 92, *supra*. The matter had previously been treated as a qualification of, and not as an exception from, the grant of jurisdiction; and being so treated, the converse words "in time of war" had been properly used. (Act of March 3,

1863, c. 75, sec. 3, 12 Stat. 736; R. S. 1342, article 58.) But (so far as we can see) the difference in phraseology has no materiality for the determination of the question, viz, whether the words "time of peace" or "time of war" in this connection connote generally the period of time when the United States as a body politic is at peace or at war, or whether they connote merely a physical condition of war or peace in a particular portion of the United States to be determined mainly by the test whether the civil courts in that particular portion are in the full and free exercise of their functions or not.

It can not (we think) be doubted that the natural meaning of these words is that first given above, viz., the period of time during which the United States, as a body politic, is at war or at peace. Certainly such a meaning would be given them in a Federal statute unless there were strong circumstances indicating that Congress had used them in some other sense, and the opinion of this court in *Hamilton* v. *Kentucky Distilleries Company* (251 U. S. 146), seems to imply as much. Moreover, the words are used in other provisions of the Articles of War where it seems to be impossible to give them any other than a broad meaning. Section 38 of the act of March 3, 1863, c. 75, 12 Stat. 737 (in which statute provision was first made for the trial by court-martial of murder, etc.), provided that "in time of war" persons acting as spies in or about any fortifications, posts, quarters, or encampment of any of the armies of the United States should be triable

by court-martial and suffer death. Here, if the intent of Congress is to be carried out, the words can not have the limited meaning. It is true that the offense defined in this statute may not be justiciable in the civil courts; but that (it would seem) cannot affect the question as to the intent of Congress in using the words "in time of war."

The act of July 13, 1866, c. 176, sec. 5, 14 Stat., 92, R. S. 1342, article 99, provided that "in time of peace" no officer of the Army should be dismissed from service except pursuant to sentence of a court-martial. In *McElrath* v. *United States* (102 U. S., 426, 438) this court, speaking by Mr. Justice Harlan, held in regard to this provision as follows:

> That act assumes to control the President, in the matter of dismissing officers from the naval and military service, only in *time of peace*. Its purpose was, upon the declaration of peace, to suspend the broad power which he exercised during the recent rebellion, when prompt, vigorous action was often demanded, to dismiss an officer from the service whenever, in his judgment, the public interests would thereby be promoted. But when was the rebellion suppressed and peace inaugurated? Not until the twentieth day of August, 1866, on which day the President announced, by proclamation, that the insurrection against the national authority was at an end, and that "peace, order, tranquillity, and civil authority" then existed "in and throughout the whole of the United States of America!" * * * Since peace, in contem-

> plation of law, could not exist while rebellion against the National Government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the "time of peace," during which the President was deprived of the power of summarily dismissing officers from the military and naval service.

So the words "in time of war" in R. S. 1342, article 59 (delivery of soldier to civil authorities) and in article 73 (commander competent to appoint general court-martial) can only (it seems) have the broad meaning. The same may be said of article 45 of the act of August 29, 1916, c. 418, 39 Stat. 657, Comp. Stats. 2308a, which provides that where the punishment is discretionary it shall not, "in time of peace," exceed such limits as the President shall prescribe.

When the main object and efficient scope of article 92, *supra*, are considered the result (it would seem) is that the broad meaning of the words "in time of peace" must be adopted, because it is the state of war, *per se*, which necessitates a larger and more drastic control over the military forces, and not the particular place at which those forces may happen to be located. But further consideration of this argument is for clearness postponed till a word is said as to the causes which have induced a correlation between the phrases "in time of war" and "in time of

peach" and the sessions of the civil courts. These causes are two, viz:

(1) The confusion originally existing between military law (the peculiar law applicable only to soldiers) and martial law (the so-called law which may in time of necessity make civilians subject to arrest and trial by military tribunals).

The terms "martial law" and "court-martial" originally came from the jurisdiction of the King's Marshall, the leader of the royal forces. Professor Maitland says, in his *Constitutional History of England*, p. 266:

> Now, as leaders of the army the constable and marshall seem to have had jurisdiction over offences committed in the army, especially when the army was in foreign parts, and in the fourteenth century we hear complaints of their attempting to enlarge their jurisdiction. Now, as a matter of etymology, *marshall* has nothing whatever to do with *martial*—the marshall is the master of the horse—he is *marescallus*, *mareschalk*, a stable servant—while of course martial has to do with Mars, the god of war. Still, when first we hear of martial law in England, it is spelt indifferently *marshall* and *martial*, and it is quite clear that the two words were confused in the popular mind—the law administered by the constable and marshall was martial law.

Thus Coke, in 4th Institutes, c. 17, p. 123, in describing the Court of the Marshall, says "and this court is the fountain of the marshall law." (See also

opinion of Attorney General Cushing, 8 Ops. A. G. 365, 366; Houldsworth, *Martial Law Historically Considered*, 18 *Law Quarterly Review* 117, 118.)

This Court of the King's Marshall functioned before the days of standing armies and when war was fought by feudal levies. Its jurisdiction was vague and undefined, including the punishment of purely military offenses defined by primitive articles of war, as well as the exercise of despotic power over rebels and their sympathizers. Mr. Houldsworth says, *ubi sup.* p. 119:

> The army for which the Constable and Marshal's Court was designed was a feudal army. It was called into existence as occasion required. It was not, as in modern times, an army of professional soldiers backed up by an adequate police. We can hardly, therefore, expect to find the modern distinction between a jurisdiction over an army and a jurisdiction over the ordinary citizen in time of rebellion. Ordinary citizens were the soldiers of the Crown, and many of the wars we should now call rebellions. Changes in political manners and military organization will, as we shall see, account for much of the obscurity in which the subject of martial law has been enveloped in modern times.

Standing armies did not come into existence till the time of Charles I, and more particularly the time of Cromwell, Charles II, and James II, and the necessary government of them by military law was confused with the arbitrary powers of the Court Marshall. The solution was not found till the passage

of the mutiny act in 1689, wherein control of the army was transferred to the people's representatives, and military law was confined to soldiers. Since then there has never been a question of the validity of military law, and the only endeavor has been to extend and strengthen its provisions. As Mr. Clode says (*Military and Martial Law*, p. 3) of the English act of 1872:

> * * * So far from being either framed without experience or unsanctioned by authority, the code is one which, in its main characteristics, has governed the army for centuries, has been administered by experienced generals, repeatedly sanctioned by the deliberate judgment of Parliament, and often upheld after argument by the constitutional tribunals of the country.

Nevertheless, the confusion between military and martial law arising from their common source still persists and is manifest in the argument on behalf of appellants.

(2) The second cause is connected somewhat with the first and has already been touched on, viz, the struggle between the people and their representatives on the one side and the executive (or Crown) on the other as to the control of the army.

The Stuarts issued several commissions for the trial of all sorts of persons by military law and military commanders. Such acts necessarily caused the greatest apprehensions among the people. Some of these commissions were condemned in the Petition of

Right (1628), and others were afterwards declared illegal. (See Clode, *ubi sup.* 20–25.) When, however, control over the army was assumed by Parliament, and its government was provided for in Statutory Articles of War, the reason for objection to military law arising out of its use by the Crown vanished (though remnants of it still appear in the preamble to the mutiny acts), and the objection never had any force in this country where the control of the Army and Navy is by the Constitution vested in the representatives of the people in Congress.

In spite of the deep-seated confusion between military law and martial law resulting from the two causes referred to above, the entire difference between the two has been noted by all persons who have had occasion to consider the matter. Chancellor Kent said (*Commentaries*, vol. 1, p. 341, note a):

> *Military* law is a system of regulations for the government of the armies in the service of the United States, authorized by the act of Congress of April 10th, 1806, and known as the *articles of war*. And *naval* law is a similar system for the government of the Navy, under the act of Congress of April 23d, 1800. But *martial* law is quite a different thing and is founded on paramount necessity and proclaimed by a military chief.

Attorney General Cushing said, in 6 Ops. A. G. 366:

> *Military* law, it is now perfectly understood in England, is a branch of the law of the land, applicable only to certain acts of a particular class of persons and administered by special

tribunals, but neither in that nor in any other respect essentially differing, as to foundation in constitutional reason, from admiralty, ecclesiastical, or, indeed, chancery and common law.

It is not the "absence of law" supposed by Sir Matthew Hale, nor is it under any circumstances the "martial law" imagined by Lord Loughborough. It is the system of rules for the government of the army and navy established by successive acts of Parliament.

The Supreme Court of Illinois in *Johnson* v. *Jones* (44 Ill. 142, 153), used even stronger language:

> As the phrases "martial law" and "military law" are sometimes carelessly used as meaning the same thing, it is proper to point out the broad distinction between them. The Constitution authorizes Congress to raise and support armies and to make rules for the government thereof. Acting under this authority, Congress has passed divers acts prescribing the rules and articles of war and providing for the government and discipline of the troops. These rules constitute the military law and are directly sanctioned by the Constitution, but they apply only to persons in the military or naval service of the Government.
>
> What is called martial law, however, has a far wider scope and application. When once established it is made to apply alike to citizen and soldier. To call this system by the name of law seems something of a misnomer. It is not law in any proper sense, but merely the

> will of the military commander, to be exercised by him only on his responsibility to his Government or superior officer.

To the same effect is Sir James Stephen in *History of Criminal Law*, vol. 1, p. 208; Sir F. Pollock, *What is Martial Law*, 18 Law Quarterly Rev. 153; Dicey, *Law of the Constitution*, 8th ed., chaps. VIII, IX, App. note x, p. 538. Finally, in *Ex parte Milligan*, 4 Wall. 2, 123 (a case greatly relied on by plaintiffs in error), the court said:

> The discipline necessary to the efficiency of the Army and Navy, required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. *All other persons* citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

We emphasise the distinction between military and martial law because, in our judgment, the importance of the condition that the civil courts shall or shall not be open arose entirely from that portion of the jurisdiction claimed by the Crown and by the Court of

the Marshall which had to do with *martial* law. When the question was one of the subjection of civilians to arrest, detention, and trial by military commissions or by court-marshall (to use the old term), it was of vital importance whether these proceedings could or could not safely and freely be taken and had before the civil courts administering the law of the land. If they could be, certainly it would be contrary to all those principles embodied in the Bills of Rights to oust them from their jurisdiction. When, however, it was a question of subjecting a soldier to the military code and to military courts, these considerations would be without any weight whatsoever. No one can accuse Mr. Justice Brewer of lack of sensitiveness to individual rights, yet in *In re Grimley* (137 U. S. 147, 152, 153), in delivering the opinion of the court, he said:

> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He can not of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. * * * While our Regular Army is small compared with those of European nations, yet its vigor and efficiency are equally

> important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed.

As the soldier has without question no right to appeal to the civil courts nor to their judgment as to his rights and duties, in many respects most important to him, it can make no difference in his case whether the said courts are open or not; and as to civilians whom he may have injured, their rights are secured by the provision in the Articles of War for surrender of such soldier to the civil authorities on their demand.

This consideration of the lack of importance and materiality to the soldiers, subject to military law, of the availability or nonavailability of the civil courts reflects upon the meaning of the phrase "in time of peace" in article 92, *supra*. If the soldier is at all times and places subject as a general thing to military law (see opening paragraph of the Articles of War, act of August 29, 1916, c. 418, sec. 3, 39 Stat. 650, Comp. Stats. 2308a), it seems necessarily to follow that the words "in time of war" or "in time of peace" as

applied to him can only refer to the general period of war or peace. The main, controlling purpose of the Articles of War is to secure an army as disciplined and efficient as possible for use "in time of war." The fundamental distinction, in so far as this use of the army is concerned, is between the period of time when the sovereign is at peace and the period when it is at war. The existence of this fact, as a general state of affairs, irrespective of limitation in space, is the important matter. The particular place where portions of the army may happen to be stationed is immaterial. Therefore, if article 92, *supra*, be construed with a mind to the main purpose of the Articles of War as a whole, there can be no doubt (we submit) that the phrase therein, "in time of peace," must be construed to mean the absence, generally, of a state of war to which the United States is a party.

It is true that in the case of *Caldwell* v. *Parker* 252 U. S. 376, this court, speaking through the Chief Justice, expressed a doubt whether the phrase "in time of war" in section 30 of the act of March 3, 1863, c. 75, and in article 59 of the Articles of War of 1874, and in article 74 of the Articles of War of 1916 did more—

> than to recognize the right of the military authorities, in time of war, within the areas affected by military operations, or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified—

a doubt which, if solved against the assump-

> tion of general military power, would demonstrate not only the jurisdiction of the State courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the revision of 1874 is considered, since in that revision the act of 1863 was in terms reenacted and the words "except in time of war," appearing for the first time in article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt; that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

It was expressly stated, however, that the court did not feel called upon to enter into an investigation of the point, and we therefore assume that the question is still open for argument, as though the remarks quoted above had not been made. If that be so, we respectfully submit the argument made above as a reason why the doubt expressed by the court in *Caldwell* v. *Parker* should be resolved in favor of a broad construction of the phrase in question. In addition we most respectfully call attention to what appears to be a misapprehension on the part of the court as to the meaning of the two authorities referred to in the opinion. It is said that Colonel Winthrop observes (*Military Law*, 2d ed., p. 1033) that section 30 of the act of March 3, 1863, c. 75, "was intended to provide" for a condition where the courts of the State were not open. What

Colonel Winthrop says of section 30 at the place cited is that "its *main object* evidently was" to provide for such a condition. He does not intimate an opinion that the section was limited to this condition.

Again the court says in *Caldwell* v. *Parker* that it was doubtless this purpose indicated by Winthrop—

> which caused the court in the *Coleman case* to say that that statute had no application to territory 'where the civil courts were open and in the undisturbed exercise of their jurisdiction' (p. 515).

The whole passage from which the above quotation from the *Coleman case* is taken reads as follows (97 U. S. 515):

> In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offences mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal Government, in which the supremacy of that Government was recognized, and *the civil courts were open and in the undisturbed exercise of their jurisdiction.* When the armies of the United States were in the territory of insurgent States, banded together in hostility to the National Government and making war against it, in other words, when the armies of the United States were in the enemy's country,

> the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own Government, and only by its laws, as enforced by its armies, could they be punished. (Italics ours.)

When this passage is read as a whole, it clearly appears that the court in the *Coleman case* expressed an opinion precisely the contrary to that attributed to it in *Caldwell* v. *Parker*. It stated that the military tribunals *had* jurisdiction (concurrently, it is true, with the courts of the States) over, e. g., murder, at times when the civil courts were open; but that where the said courts were not open the military tribunals had exclusive jurisdiction over such offenses.

(*b*) It is claimed by counsel for plaintiffs in error that if the construction of article 92 contended for by us be adopted, the statute would be unconstitutional. To so hold, however, would be to go contrary to the numerous authorities which, from the time of the Constitution (and before) have sustained the jurisdiction of military and naval tribunals over soldiers and sailors. Many cases have dealt with and sustained jurisdiction over offenses which could likewise have been dealt with by the civil courts, e. g., *Ex parte Reed*, 100 U. S. 13 (embezzlement); *Ex*

parte Mason, 105 U. S. 696 (assault with intent to kill); *Smith* v. *Whitney*, 116 U. S. 167 (embezzlement); *Johnson* v. *Sayre*, 158 U. S. 109 (embezzlement); *Swaim* v. *United States*, 165 U. S. 553 (fraud); *Carter* v. *McClaughry*, 183 U. S. 365 (fraud and embezzlement); *Grafton* v. *United States*, 206 U. S. 333 (homicide); *Franklin* v. *United States*, 216 U. S. 559, 566, 567 (embezzlement and fraud). See also *United States* v. *Clark*, 31 Fed. 710 (homicide); *Re Stubbs*, 133 Fed. 1012 (homicide); *United States* v. *Hirsch*, 254 Fed. 109 (conspiracy to defraud).

It makes no difference (we submit) whether, in the above cases, the offense was charged as a violation of the general article (in the act of August 29, 1916, c. 418, article 96) punishing all crimes and offenses not capital of which persons subject to military law may be guilty, or not. When the question is as to the power of Congress under the Constitution, the power must be limited, on the one hand, to such offenses as have a legitimate bearing on the government of the Army; but, on the other hand, within such limitation, Congress has the choice as to how far it shall go. Therefore, Congress may punish, e. g., murder and rape committed by persons in the military or naval service, either under those names, as in article 92, *supra*, or as acts prejudicial to discipline. No one can dispute that, by whatever name the offense is called, the offenses themselves are prejudicial to the discipline and efficiency of the Army and Navy and therefore subject to punish-

ment by military law under the broad powers granted to Congress. (See *McKinley* v. *United States*, 249 U. S. 397.) That this is so is clearly shown by the opinion of the court in *Ex parte Mason* (105 U. S. 696, 699, 700), where the punishment fixed by the State law for the offense is adopted as the measure of the punishment for the court-martial whose jurisdiction and constitutional power the court sustained.

In *1st Commentaries* (p. 341, note a), Chancellor Kent said:

> It is not a question susceptible of doubt, that Congress may, under the Constitution, confer upon courts-martial in the Army and Navy the trial and punishment of crimes, capital and otherwise, for they are authorized "to make rules for the government and regulation of the land naval forces"; and cases "arising in the land and naval forces" are excepted from the provision, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

In *Coleman* v. *Tennessee* (97 U. S. 509, 514), Mr. Justice Field, delivering the opinion of the court, said:

> We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offences committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution "to raise and support armies" and

"to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offences committed by persons in the military service, would seem to be plenary.

These reasons apply *a fortiori* to the case of the murder of one military prisoner by another within the confines of the prison. In such cases article 74 of the Articles of War (act of August 29, 1916, c. 418, § 3), expressly forbids the surrender of the offender to the civil authorities. The matter is one of the internal discipline of a military prison, and therefore clearly within the constitutional powers of Congress.

THE PRIOR SENTENCES.

We think we should also call the attention of the court to the lack of any allegation in the petition for habeas corpus that the prior sentences imposed upon appellants had expired at the time the petition was presented. If they had not, it may be that the application was premature, and the case really a moot one.

CONCLUSION.

We respectfully submit that the judgment of the District Court denying the writ should be affirmed.

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DECEMBER, 1920.